me Court, U.S.
I L E D

021578 APR 28 2003

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

CONRAIL C/O TRANSPORTATION DISPLAYS, INC.,
Petitioner,

v.

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), THE CENTER CITY RESIDENTS ASSOCIATION, MARY CRAWLEY TRACY, PHILADELPHIA COUNCILWOMAN ANNA VERNA AND PHILADELPHIA COUNCILMAN DAVID COHEN
AND
THE ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

THOMAS A. LEONARD
Counsel of Record
PAUL S. DIAMOND
RICHARD P. LIMBURG
STEPHEN W.W. CHING, JR.
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
ONE PENN CENTER -- 19TH FLOOR
1617 JOHN F. KENNEDY BOULEVARD
PHILADELPHIA, PA 19103-1895
(215) 665-3000
Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the enforcement of a zoning classification that is erroneous on its face a violation of the due process and takings clauses of the United States Constitution?

2. Under the due process and takings clauses of the United States Constitution, should the burden for obtaining a dimensional variance be different from and lower than the burden for obtaining a use variance?

PARTIES AND RULE 29.6 STATEMENT

Petitioners are Conrail, a railroad and the fee owner of the subject property, and Transportation Displays, Inc., a commercial outdoor advertising company. Norfolk Southern Corporation and CSX Corporation are publicly traded companies, and each of them indirectly owns more than 10% of Conrail. Transportation Displays, Inc. is a division of Infinity Broadcasting, Corporation, which is largely owned by Viacom, Inc., a publicly traded company.

Respondents are the following civic groups, taxpayers and elected officials: the Society Created to Reduce Urban Blight (SCRUB), the Center City Residents Association, Mary Crawley Tracy, Philadelphia Councilwoman Anna Verna and Philadelphia Councilman David Cohen. When Respondents appealed the decision of the Zoning Board of Adjustment of the City of Philadelphia granting a variance to Petitioners, the Zoning Board and the City of Philadelphia became parties of record in the proceedings below.

TABLE OF CONTENTS

Questions Presented i

Parties and Rule 29.6 Statement ii

Table of Contents iii

Table of Authorities vii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Factual and Procedural Background 4

Reasons for Granting Certiorari 9

A. The Enforcement Of A Zoning Designation That Is Acknowledged By All To Be Erroneous Violates Conrail's Due Process Rights Under The Federal Constitution 9

1. The Classification of the Property as Recreational Is Facially Invalid 10

2. The Enforcement of a Facially Invalid Zoning Classification Is Unconstitutional 11

3. Because The "Recreational" Classification is Invalid, The Signs Are a Permitted Use 16

B. Denying a Dimensional Variance Based on the Standard for a Use Variance Violates Conrail's Due Process Rights Under The Federal Constitution 17

1. The Standard for Dimensional Variances Should Be Different From and Lower than the Standard for Use Variances 18

2. The Commonwealth Court Incorrectly Applied the Standard for Use Variances 20

a. Section 14-1604 Is Not A Zoning Classification 21

b. The Variance from §14-1604 Granted by the Zoning Board Related Solely to Matters of Measurement 22

c. The Commonwealth Court Imposed a Higher Standard for a Dimensional Variance than for a Use Variance 23

CONCLUSION 26

APPENDIX

Appendix A

Supreme Court of Pennsylvania Order - 1/28/03 . . . . . 1a

Appendix B

Supreme Court of Pennsylvania Order - 11/20/01 . . . . . 3a

Appendix C

Commonwealth Court of Pennsylvania Opinion and Order - 4/26/01 . . . . . 5a

Appendix D

Philadelphia County Common Pleas Opinion - 9/5/00 . . . . . 15a

Appendix E

Philadelphia County Common Pleas Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment - 7/6/99

No. 003700 . . . . . 27a
No. 003705 . . . . . 47a
No. 003707 . . . . . 66a
No. 003712 . . . . . 85a

Appendix F

Constitutional Provisions Statutes and Ordinances 105a

Appendix G

Quotations of Portions of the Record Where Federal Questions Were Raised 127a

Appendix H

Hearing Transcript - 5/12/99 . . . . . 147a

Appendix I

Hearing Transcript - 1/24/00 . . . . . 224a

Appendix J

Brief for Appellant Conrail c/o Transportation Displays, Inc. 268a

Appendix K

Petition for Allowance of Appeal of Conrail c/o Transportation Displays, Inc. 304a

Appendix L

Application for Reconsideration of the Court's Order Denying the Petition for Allowance of Appeal of Conrail c/o Transportation Displays, Inc. 338a

TABLE OF AUTHORITIES

CASES

A.A. Profiles, Inc. v. City of Fort Lauderdale,
253 F.3d 576 (11th Cir. 2001) 24

Adams Outdoor Advertising, Ltd. v. Hanover Township Zoning Hearing Board,
159 Pa. Commw. 372, 633 A.2d 240 (1993) . . . 16

Agins v. Tiburon, 447 U.S. 255 (1980) 9, 12

Alsenas v. City of Brecksville,
29 Ohio App.2d 255, 281 N.E.2d 21
(Ohio Ct. App. 1972) 10

Anstine v. Zoning Board of Adjustment of York Township,
411 Pa. 33, 190 A.2d 712 (1963) 12

Britton v. Chester,
134 N.H. 434, 595 A.2d 492 (N.H. 1991) 16

Buskey v. Town of Hanover,
133 N.H. 318, 577 A.2d 406 (1990) 10

Board of Commissioners of Ross Township v. Harsch,
467 A.2d 1183 (Pa Commw. 1983) 7

C&C Marine Maintenance Corporation v. Zoning Hearing Board of Georgetown Borough,
686 A.2d 896 (Pa. Commw. 1996) 17

Cameron v. Board of Adjustment of Greensburg,
281 A.2d 271 (Pa. Commw. 1971) 17

Casey v. Zoning Hearing Board of Warwick Township,
459 Pa. 219, 328 A.2d 464 (1974) 16

Chesterfield Village, Inc. v. City of Chesterfield,
No. ED78444,2001 Mo. App. LEXIS 787
(Mo.Ct.App., May 9, 2001) 14

City of Atlanta v. McLennan,
237 Ga. 25, 226 S.E.2d 732 (1976) 17

Colligan Zoning Case,
401 Pa. 125, 162 A.2d 652 (1960) 9, 12, 25

Damico v. Zoning Board of Adjustment,
164 Pa. Commw. 394, 643 A.2d 156 (1994) . . . 22

DeBlasio v. Zoning Board for the Township of West Amwell,
53 F.3d 592 (3d Cir. 1995) 11

Gilani v. Board of Adjustment of New Castle County,
Civil Action No. 00A-07-009-JOH,
2001 Del. Super. LEXIS 309
(Del. Super. July 27, 2001) 18

Girsch Appeal, 437 Pa. at 237, 263 A.2d at 395 (1970) 9

Go v. Sugarcreek Township Board of Zoning,
C.A. Case No. 2000 CA 66,
2001 Ohio App. LEXIS 2460
(Ohio Ct. App. June 1, 2001) 19

Gormally v. Shiff,
188 Misc. 2d 873, 729 N.Y.S.2d 880
(N.Y.Supr.Ct., 2001) 19

Harris v. Missouri Department of Conservation,
755 S.W.2d 726 (1988) 15

Hertzberg v. Zoning Board of Adjustment of Pittsburgh,
554 Pa. 249, 721 A.2d 43 (1998) . . . 6, 18, 23, 24

Huebner v. Village of Carrolton, Ohio,
1980 Ohio App. LEXIS 10467
(Ohio Ct. App. December 30, 1980) 10

In re Appeal of Borough of Akron,
159 Pa. Commw. 420, 633 A.2d 1244 (1993) . . 17

Kaufman and Broad, Inc. v. Board of Supervisors of
West Whiteland Township,
340 A.2d 909 (Pa.Commw. 1975) 7

Mayfield-Dorsh, Inc. v. South Euclid,
68 Ohio St.2d 156,
429 N.E.2d 159 (Ohio 1981) 16

New Products Corp. v. City of North Miami,
271 So.2d 24 (Fla. App. 1972) 13

North Olmstead Land Holdings, Ltd. v. Planning Commission
of the City of North Olmstead,
No. 77658, 2001 Ohio App. LEXIS 5038
(Ohio Ct. App., November 8, 2001) 15

Pa. Northwestern Distributors, Inc. v. Zoning Hearing
Board of Township of Moon,
526 Pa. 186, 584 A.2d 1372 (1991) 9

Penn Central Transportation Co. v. New York City,
438 U.S. 104 (1978) 14

Pyzdrowski v. Pittsburgh Board of Adjustment,
437 Pa. 481, 263 A.2d 426(1970) 22

Richmond v. Randall,
215 Va. 506, 211 S.E.2d 56 (Va. 1975) 16

San Remo Hotel L.P. v. City and County of San Francisco,
83 Cal. App. 4th 239, 100 Cal.Rptr.2d 1
(Cal.Ct.App. 2000) 14

Schwartz v. Flint, 426 Mich. 295,
395 N.W.2d 678 (Mich. 1986) 16

Sinclair Pipe Line Company v. Richton Park,
19 Ill. 2d 370, 167 N.E.2d 406 (Ill. 1960) 16

Union Oil Co. of California v. Worthington,
62 Ohio St. 2d 263,
405 N.E.2d 277 (Ohio 1980) 16

Village of Euclid, Ohio v. Ambler Realty Co.,
272 U.S. 365 (1926) 9, 11

Wisconsin v. Kenosha County Board of Adjustment,
218 Wis. 2d 396, 577 N.W.2d 814 (1998) 19

Wisconsin v. Outagamie County Board of Adjustment,
244 Wis. 2d 613,
628 N.W.2d 376 (Wis. June 29, 2001) . . . 18, 19

CONSTITUTIONAL PROVISIONS

U.S. Constitution Fifth Amendment 2, 9

U.S. Constitution Fourteenth Amendment 2, 9, 24

Pennsylvania Constitution Article 1, Section 1 2

Pennsylvania Constitution Article 2, Section 10 2

STATUTES

28 U.S.C. § 1257(a) 2

53 P.S. § 10107 7

Philadelphia Zoning Code § 14-701 . . . . 2, 4-6, 10-13, 16

Philadelphia Zoning Code § 14-1604 . . . . . 2, 4, 6, 20-23

Philadelphia Zoning Code § 14-1604(2) 21

Philadelphia Zoning Code § 14-1604(9)(b) 21

Philadelphia Zoning Code § 14-1604(10)(a) 22

Philadelphia Zoning Code § 14-1802 2

OTHER AUTHORITY

Anderson, *American Law of Zoning*, 2d ed., §20.07 . . . 22

Robert S. Ryan, *Pennsylvania Zoning Law and Practice*, §6.3.1 (1992) 22

3 Kenneth H. Young, Anderson's American Law of Zoning § 20.48 (4th Ed. 1996) 20

OPINIONS BELOW

The January 28, 2003 Order of the Supreme Court of Pennsylvania denying reconsideration in *Society Created to Reduce Urban Blight (SCRUB), et al v. Zoning Board of Adjustment of the City of Philadelphia and the City of Philadelphia and Conrail c/o Transportation Displays, Inc.*, No. 260 EAL 2001, and its earlier Order of November 20, 2001 denying allocatur are not published and are reproduced in Appendix A at 1a and Appendix B at 3a.

The April 26, 2001 decision of the Commonwealth Court of Pennsylvania, No. 1523 C.D. 2000, is published at 772 A.2d 1040 (2001) and is reproduced in Appendix C at 5a-14a.

The Order of the Court of Common Pleas for Philadelphia County, Pennsylvania, dated May 26, 2000, July Term, 1999, Nos. 3700, 3705, 3707 and 3712, and its Opinion dated September 5, 2000 are not published, and are reproduced in Appendix D at 15a-26a.

The Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment of the City of Philadelphia, Pennsylvania, dated July 6, 1999, Nos. 99-407, 99-408, 99-409 and 99-410 are not published and are reproduced in Appendix E at 27a-104a.

STATEMENT OF JURISDICTION

The decision of the Commonwealth Court of Pennsylvania was entered on April 26, 2001. The order of the Pennsylvania Supreme Court denying allocatur was entered on November 20, 2001. The Pennsylvania Supreme Court denied reconsideration by order dated January 28,

2003. This petition is filed within 90 days of January 28, 2003. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

No notification is required under Rule 29.4(b), because this case draws into question the constitutionality of a zoning ordinance of the City of Philadelphia rather than a statute of the Commonwealth of Pennsylvania. The City of Philadelphia was a named party in the proceedings below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution are reproduced in Appendix F at 105a-106a. Sections 1 and 10 of Article I of the Pennsylvania Constitution are reproduced in the Appendix at 107a-108a.

Sections 14-701, 14-1604, and 14-1802 of the Philadelphia Zoning Code are reproduced in the Appendix at 109a-126a.

STATEMENT OF THE CASE

Conrail and Transportation Displays, Inc. (collectively "Conrail") wish to erect outdoor advertising signs on a property in South Philadelphia, located west of South Broad Street and between the Philadelphia Naval Yard to the south and Interstate 95 ("I-95") and Franklin D. Roosevelt Park to the north (the "Property"). The Property measures approximately 2,700 feet east to west and approximately 55 feet north to south. Its northern boundary is located from 40 to 70 feet south of the southern side of I-95, which is elevated at this location. Although two active rail lines occupy part of

the Property, the remainder of the Property is not used and cannot be used if current zoning restrictions are enforced.

The Property is zoned "Recreational," a classification that prohibits outdoor advertising signs. The classification is facially invalid, because, by its own terms, it only applies to publicly owned land devoted to park and/or recreational uses. The subject Property is owned in fee simple by Conrail and is not suitable for park or recreational uses. Because the zoning classification cannot constitutionally be enforced, a variance should be granted or the Property should be deemed unzoned.

Because of the Property's proximity to I-95 and because of the elevation of I-95, it is impossible to place outdoor advertising signs directed to I-95 on the Property without a dimensional variance from Philadelphia's special sign controls. The proposed signs were designed to comply as much as possible with the sign controls.

The courts below acknowledged that the "Recreational" classification was facially invalid, but denied on the ground that invalid zoning was not an "unnecessary hardship" and did not justify a use variance from the "Recreational" classification. The courts so held, despite the fact that the enforcement of the invalid zoning classification could not be rationally related to any governmental interest. The courts below also denied a dimensional variance from Philadelphia's special sign controls, applying a legal standard that was arguably more onerous than the standard for use variances. In every state that distinguishes between dimensional variances and use variances, the burden for obtaining dimensional variances is lower than for use variances. On both counts, Conrail was deprived of valuable property rights without due process of law.

Factual and Procedural Background

On March 26, 1999, Conrail applied to the Philadelphia Department of Licenses and Inspections ("L&I") for a permit to erect four free-standing, double-faced, "V" shaped, non-accessory outdoor advertising signs, each measuring 14 feet in height by 48 feet in length. The proposed signs would be oriented to vehicles traveling on I-95, with the apex of the "V" pointed towards I-95 and the faces of the signs almost perpendicular to I-95. Three of the proposed signs would be within 660 feet of an ingress or egress ramp to or from I-95, and all four signs would be within 660 feet of FDR Park.

Directly west of FDR Park is the Philadelphia Solid Waste Transfer Station and a large petroleum tank farm. Directly east are Broad Street, which runs north-south, and the First Union Sports Center and accessory parking lots. The land under the elevated I-95 roadway belongs to the City; people use it for parking and skateboarding. The City owns another parcel of land directly south of the Property, which is used not for recreational purposes. It appears abandoned, and people use it as an open air parking lot. The next parcel to the south is the former Naval Yard.

L&I refused to issue the sign permits, on the ground that outdoor advertising signs are not permitted within a Recreational District under §14-701 of the Philadelphia Zoning Code, and because the proposed signs did not comply with the special sign controls in §14-1604. The special sign controls, inter alia, prohibit outdoor advertising signs from: (a) being erected unless signs of equal size are removed; (b) being located within 660 feet of an ingress or egress ramp of the Delaware Expressway (a/k/a "I-95"); and (c) being located within 660 feet of a park under the jurisdiction of the

Fairmount Park Commission or the Department of Recreation.

Conrail timely appealed to the Zoning Board of Adjustment of the City of Philadelphia (the "Zoning Board"), which held a public hearing on May 12, 1999. At that hearing, Conrail raised a substantive challenge to the classification of its Property as "Recreational," and argued that the "Recreational" classification was invalid on the face of §14-701 of the Philadelphia Zoning Code and amounted to an improper regulatory taking. (N.T. May 12, 1999 Zoning Board Hearing at 88-89, 25-26, 9-10, 11-12, 12-13, 23-24, 27,62, 63; App. at 127a-134a).

By Notice of Decision dated July 6, 1999, the Zoning Board granted Conrail a use variance from the Recreational Zoning classification and a dimensional variance from the special sign controls. The Zoning Board filed its supporting Findings of Fact and Conclusions of Law on November 12, 1999. (App. at 27a-104a).

In its Findings of Fact and Conclusions of Law, the Zoning Board found that the Property was improperly classified as a Recreational District; that the improper classification created an unnecessary hardship; that the hardship was not self-imposed; that the proposed signs would not negatively affect public health, safety or welfare; and that the requested variance was the minimum needed to afford relief. (App. at 41a-43a, 61a-63a, 80a-82a, and 99a-102a).

The Society Created to Reduce Urban Blight, the Friends of FDR Park, the Center City Residents Association, Mary Cawley Tracy, Councilwoman Anna Verna, and Councilman David Cohen (collectively "SCRUB") timely appealed the Zoning Board's decision to the Philadelphia

Court of Common Pleas. The Common Pleas Court reviewed the Zoning Board's decision on the record created before the Zoning Board. Conrail again argued that the "Recreational" classification was invalid on the face of Section 14-701 and in derogation of Conrail's constitutional rights. (N.T. January 24, 2000 Common Pleas Court Hearing at 41-42, 13-14, 23-24; App. at 134a-138a). Conrail also argued that, with respect to the requirements of §14-1604, it was entitled to have its proposal evaluated under the legal standard for a dimensional variance as set forth in Hertzberg v. Zoning Board of Adjustment of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), rather than the standard for a use variance. (N.T. January 24, 2000 Common Pleas Court Hearing at 34, 36-37, 47- 48; App. at 139a-142a). Following oral argument and briefs, the Common Pleas Court reversed the Zoning Board's grant of a variance by order dated May 26, 2000. (App. at 15a).

Conrail timely appealed to the Commonwealth Court on June 23, 2000. The Common Pleas Court filed an opinion in support of its order on September 5, 2000. In its opinion, the Court of Common Pleas agreed that the Property was incorrectly zoned under §14-701:

> This Court does not dispute that the property was incorrectly zoned. Clearly a piece of land such as the one concerned in this matter, which has functional and active railroad tracks, does not fit under the criteria for land which is to receive "recreational" zoning under the City of Philadelphia Zoning Code § 14-701(1).

(App. at 24a). Nevertheless, the Common Pleas Court overruled the variance from the requirements of §14-1604, on

the ground that Conrail was already using the Property for the railroad business.

On appeal to the Commonwealth Court, Conrail again argued that the "Recreational" zoning classification was a nullity and urged the application of the standard for a dimensional variance, as opposed to the higher standard for a use variance. (Petitioner's Brief before the Commonwealth Court at 4; App. at 142a-144a and 278a-279a). Conrail also argued that enforcing the invalid "Recreational" classification was arbitrary and unreasonable, in violation of Conrail's constitutionally protected property rights. (Petitioner's Brief before the Commonwealth Court at 20-21; App. at 144a-146a and 297a-300a).

By order and opinion dated April 26, 2001, the Commonwealth Court denied Conrail's appeal and affirmed the holdings of the Common Pleas Court. (App. at 5a-14a). The Commonwealth Court did not disagree that the classification of the Property was erroneous, but held that Conrail should have sought a "curative" zoning amendment.[1]

[1] Pennsylvania's Municipalities Planning Code provides for curative zoning amendments, 53 P.S. §10609.1, and further provides that the denial of a curative amendment is reviewable by the courts. Board of Commissioners of Ross Township v. Harsch, 467 A.2d 1183 (Pa Commw. 1983). Although the courts cannot order the adoption of a curative amendment, they can grant variances if they determine that the zoning ordinance unlawfully restricts a proposed use. Id. at 1186-1187; cf. Kaufman and Broad, Inc. v. Board of Supervisors of West Whiteland Township, 340 A.2d 909 (Pa.Commw. 1975). However, the Municipalities Planning Code only applies to cities and counties of Classes 2 through 8 (53 P.S. 10107, definitions of "City" and "County"). It does not apply to Philadelphia, which is a city and a county of the First Class. The Philadelphia Zoning Code does not contain any

The Commonwealth Court also held that the invalid "Recreational" classification did not create an unnecessary hardship, because the erroneous classification was not a unique physical condition of the Property. Next, the Commonwealth Court found that the variances required from Philadelphia's special sign controls were not dimensional. However, even if the variances were dimensional, the Commonwealth Court held that Conrail was not entitled to a dimensional variance unless it could show not only an unnecessary hardship arising from unique physical circumstances of the Property but also an inability to use the property for any other purpose, a standard arguably more onerous than the standard for use variances. (App. at 11a-12a).

Conrail timely petitioned the Pennsylvania Supreme Court for allowance of appeal. (App. at 304a). The Pennsylvania Supreme Court denied allocatur by Order dated November 20, 2001. (App. at 3a). Conrail timely sought reconsideration on December 4, 2001. (App. at 338a). The Pennsylvania Supreme Court did not deny reconsideration until January 28, 2003. (App. at 1a).

---

comparable provision for curative amendments. Thus, the Commonwealth Court would leave Conrail without any judicial remedy for a substantively invalid zoning classification.

REASONS FOR GRANTING CERTIORARI

A. The Enforcement Of A Zoning Designation That Is Acknowledged By All To Be Erroneous Violates Conrail's Due Process Rights Under The Federal Constitution

This Court should grant certiorari because the enforcement of the facially invalid "Recreational" zoning classification violates Conrail's due process rights under the Federal Constitution.

A property owner has an inherent and indefeasible right to utilize his own land as he sees fit which the United States and Pennsylvania Constitutions protect against taking for public purposes without due process or without just compensation. Agins v. Tiburon, 447 U.S. 255, 260 (1980); Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 394 (1926); Pa. Northwestern Distributors, Inc. v. Zoning Hearing Board. of Township of Moon, 526 Pa. 186, 193, 584 A.2d 1372, 1375 (1991) (citing Pa. Const. Art. I, §§ 1 and 10); Girsch Appeal, 437 Pa. 237, 241 n. 3, 263 A.2d 395, 397 n. 3 (1970) (referring to 5th and 14th Amendments of the Federal Constitution). Given the fundamental rights at stake, courts will declare zoning regulations unconstitutional as violative of substantive due process where they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Village of Euclid, 272 U.S. at 394. See Agins, 447 U.S. at 260 ("[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or [if it] denied an owner economically viable use of his land"). This is true, whether the zoning ordinance is a use regulation or a dimensional regulation. Colligan Zoning Case, 401 Pa. 125,

129, 162 A.2d 652, 653-54 (1960) (stating that a borough's interpretation of setback restrictions would be an unreasonable and thus unconstitutional interference of property rights where the restriction as applied to the specific property had no relation to safety, health or morals).[2]

1. The Classification of the Property as Recreational Is Facially Invalid

The Philadelphia Zoning Code provides that only a narrow class of properties may properly be designated as "Recreational":

> 14-701. Recreational Districts.
>
> (1) Parcels of public land under the jurisdiction of the City of Philadelphia Department of Recreation, Fairmount Park Commission, the Department of Forests and Waters of the Commonwealth of Pennsylvania,

[2] Courts in other jurisdictions have held that a property owner's due process rights are violated as a result of unreasonable and arbitrary zoning when land-use restrictions are "permitted to remain in force" despite the fact that there is no reason to believe that "the necessity of regulation in the public interest outweighs, qualitatively, the impact imposed on the individual property owner." Alsenas v. City of Brecksville, 29 Ohio App.2d 255, 260-61, 281 N.E.2d 21, 24-25 (Ohio Ct. App. 1972); Huebner v. Village of Carrolton, Ohio, 1980 Ohio App. LEXIS 10467, *7 (Ohio Ct. App. December 30, 1980); Buskey v. Town of Hanover, 133 N.H. 318, 323, 577 A.2d 406 410 (1990) ("[w]hen the restriction as applied to a particular piece of land is unnecessary to accomplish a legitimate public purpose or the gain to the public is slight but the harm to the citizen and his [or her] property is great, the exercise of police power becomes arbitrary and unreasonable").

> and the National Park Service of the United States Government which are devoted to park and/or recreational purposes may be designated on the zoning maps as Recreational.

Philadelphia Code, § 14-701(a)(1) (emphasis added).

It is undisputed that Conrail owns the Property in fee simple and that it cannot be considered public land. It is also undisputed that the Property is not devoted to park or recreational purposes and is not under the jurisdiction of a state, local, or federal parks department. Thus, the classification of the Property as "Recreational" is invalid on the face of the Zoning Code.

This is not merely a case of a classification that is overly restrictive for existing uses. By its own terms, the "Recreational" designation only applies to a narrow class of properties – public parks and public recreational areas under the jurisdiction of a state, local or federal parks department. This designation cannot apply to any privately owned land, regardless of its use. Thus, the erroneous "Recreational" classification is not saved by the doctrine of prior non-conforming use.

2. The Enforcement of a Facially Invalid Zoning Classification Is Unconstitutional

It is well settled that zoning regulations are unconstitutional if they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Village of Euclid, Ohio, 272 U.S. at 394 (1926). Accord, DeBlasio v. Zoning Board for the Township of West Amwell, 53 F.3d

592, 601 (3d Cir. 1995) ("in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached"). Cf. Anstine v. Zoning Board of Adjustment of York Township, 411 Pa. 33, 40, 190 A.2d 712, 716 (1963) (it was arbitrary and unreasonable to deny a variance for a mobile home in a residential district that excluded trailers, where the proposal stated that the mobile home would be rendered structurally immobile by removing the undercarriage and bolting the structure to a concrete block foundation).

Likewise, a zoning restriction is unconstitutional if it does not advance a legitimate government interest. Agins, 447 U.S. at 260 (1980) ("[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests"); Colligan Zoning Case, 401 Pa. at 128-131, 162 A.2d at 653-54 (1960) (stating that a borough's interpretation of street front restrictions would be an unreasonable interference with property rights where the application of the restriction to the subject property had no relation to safety, health or morals).

In this case, the "Recreational" zoning classification of the Property is wholly inconsistent with the provisions and purpose of §14-701. As such, the classification is arbitrary and unreasonable and cannot constitutionally be enforced to deny a use that would be permitted if the Property were zoned in a reasonable manner, consistent with the ownership and use of the Property and the zoning of the surrounding properties.

The erroneous classification of private land as a "public park" was held to be arbitrary and unreasonable in New Products Corp. v. City of North Miami, 271 So.2d 24 (Fla. App. 1972). There, a commercial developer purchased real property from the City of North Miami. The property was classified for use as a public park, but the City agreed to reclassify the property as commercial if the purchaser filed an application for rezoning. New Products, supra, 271 So.2d at 25. When the City subsequently denied plaintiff's application to rezone the property, the purchaser brought an action for a declaratory judgment that the classification of the property as a "public park" was unconstitutional. Id. The Florida Court of Appeals struck down the "public park" zoning because it unconstitutionally restricted the property from being used for any purpose other than a public park:

> The present status of the subject parcel is untenable. It is now zoned for public park use only and is owned by a private party. This zoning classification is totally inconsistent with the ownership of the property. As such, it is the duty of the city to rezone the property in a manner consistent with its ownership. . . . To leave the subject property in its present classification completely deprives the owner of any beneficial use of his property by precluding all possible uses of same. This cannot be sanctioned by the courts.

New Products, supra, 271 So.2d at 25.

Similarly, the City of Philadelphia has no legitimate interest in classifying private property as "Recreational," contrary to the terms of §14-701, especially where, as here, the property is unsuitable for recreational use under any

reasonable interpretation of that term. Moreover, the Zoning Board held below that the proposed signs will not negatively impact the public. Thus, enforcing the "Recreational" zoning classification against the proposed signs has no substantial relation to public health, safety, morals or general welfare.

Because the classification of the Property as "Recreational" is arbitrary, unreasonable, and unrelated to any legitimate government interest, it is an unconstitutional deprivation of property and due process to enforce it against Conrail, so as to deprive Conrail of a use that would be permitted if the Property were zoned in a reasonable manner and would not negatively impact the public. In this case, the constitutional violation is aggravated by the fact that the Commonwealth Court denied Conrail's right to judicial relief on the ground that Conrail should have sought a curative zoning amendment. As explained in footnote 1 above, there is no provision for curative amendments in Philadelphia's zoning code, and the statutory provision for curative amendments in Pennsylvania's Municipalities Planning Code does not apply to Philadelphia. Thus, the Commonwealth Court would leave Conrail without any judicial remedy for a substantively invalid zoning classification.

Government action pursuant to a wrongful zoning designation or similar regulatory classification constitutes a "regulatory taking" in violation of the Federal and State Constitutions. See e.g., Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127 (1978); Chesterfield Village, Inc. v. City of Chesterfield, No. ED78444,2001 Mo. App. LEXIS 787, *4 (Mo.Ct.App., May 9, 2001) (zoning classification was unreasonable and arbitrary and unconstitutional; municipality's refusal to rezone constituted a regulatory taking); San Remo Hotel L.P. v. City and County of San Francisco, 83 Cal. App. 4th 239, 255, 100

Cal.Rptr.2d 1, 33-34 (Cal.Ct.App. 2000) (hotel stated takings claim where City had erroneously classified hotel rooms as residential, thereby precluding use of the hotel by overnight guests); Harris v. Missouri Department of Conservation, 755 S.W.2d 726, 730-731 (1988) (state wrongly declared that private lake constituted state waters; the declaration amounted to a regulatory taking of the right to use the lake for commercial fishing).

In North Olmstead Land Holdings, Ltd. v. Planning Commission of the City of North Olmstead, No. 77658, 2001 Ohio App. LEXIS 5038 (Ohio Ct. App., November 8, 2001), the City rezoned plaintiff's property for office use only and refused repeated requests by the plaintiff to rezone the property. Id. at *1-*2. Plaintiff filed an action to declare that the City's actions in both improperly designating the Property for office use and in proscribing other uses amounted to an unconstitutional taking. Id. at *2, *6. The Court found that it was "beyond fair debate" that the City's zoning of the property was "arbitrary, unreasonable and not substantially related to the public health, safety, morals, or general welfare of the community." Id. at *6, *7. Further, the Court held that once the existing zoning was determined to be improper, the property should have been rezoned for a proper use "to avoid leaving the property in an unzoned classification." Id. at *9.

In Harris, the Missouri Court of Appeals held that a property owner had properly stated a claim for inverse condemnation where he alleged that the Missouri Department of Conservation erroneously classified a lake on the property as state waters, thereby precluding the owner from using the lake for commercial fishing, diminishing the value of the land, and eventually resulting in the sale of the land. Harris, 755 S.W.2d at 729-731.

In this case, there is no question that the City's designation of the Property as "Recreational" was erroneous on the face of §14-701 and that the erroneous zoning designation was "arbitrary, unreasonable, and not substantially related to the public health, safety, morals, or general welfare of the community." Thus, enforcing the invalid "Recreational" classification to preclude Conrail from erecting the proposed signs was an unconstitutional deprivation of property without due process of law.

3. Because The "Recreational" Classification is Invalid, The Signs Are a Permitted Use

Under Pennsylvania law, the remedy for a constitutionally invalid zoning ordinance is to approve the proposed use (subject to pre-existing regulations relating to land and structures), unless the proposed use would be injurious to the public health safety and welfare. Casey v. Zoning Hearing Board of Warwick Township, 459 Pa. 219, 230, 328 A.2d 464, 469 (1974); Adams Outdoor Advertising, Ltd. v. Hanover Township Zoning Hearing Board, 159 Pa. Commw. 372, 382-84, 633 A.2d 240, 245-46 (1993).[3]

[3] Cases from other states are in accord: Britton v. Chester, 134 N.H. 434, 444, 595 A.2d 492, 498 (N.H. 1991) ("Once an existing zoning ordinance is found invalid . . . , the court may provide relief in the form of a declaration that the plaintiff builder's proposed use is reasonable, and the municipality may not interfere with it"); Schwartz v. Flint, 426 Mich. 295, 325-331, 395 N.W.2d 678, 691-693 (Mich. 1986) (same); Mayfield-Dorsh, Inc. v. South Euclid, 68 Ohio St.2d 156, 159-160, 429 N.E.2d 159, 162 (Ohio 1981) (same); Union Oil Co. of California v. Worthington, 62 Ohio St. 2d 263, 266, 405 N.E.2d 277, 280 (Ohio 1980) (same); Richmond v. Randall, 215 Va. 506, 513, 211 S.E.2d 56, 61 (Va. 1975) (same); Sinclair Pipe Line Company v. Richton Park, 19 Ill. 2d

Alternatively, under Pennsylvania law, property that has been invalidly zoned may deemed "unzoned." See In re Appeal of Borough of Akron, 159 Pa. Commw. 420, 424, 633 A.2d 1244, 1246-47 (1993); Cameron v. Board of Adjustment of Greensburg, 281 A.2d 271, 272-73 (Pa. Commw. 1971). Cf. C&C Marine Maintenance Corporation v. Zoning Hearing Board of Georgetown Borough, 686 A.2d 896 (Pa. Commw. 1996).

There is no dispute that that the Property is privately-owned, and thus the classification of the Property as "Recreational" – a designation reserved for public parks -- is incorrect and invalid. It is also uncontested that the proposed signs are not "injurious to the public health, safety, welfare, and morals." Neither the Commonwealth Court nor the Court of Common Pleas concluded that the proposed signs would pose a threat to public health or safety. Thus, the proposed signs must be treated as a permitted use of Conrail's Property.

B. Denying a Dimensional Variance Based on the Standard for a Use Variance Violates Conrail's Due Process Rights Under The Federal Constitution

This Court should also grant certiorari because applying the standard for use variances to dimensional variances violates Conrail's due process rights under the Federal Constitution. The primary purpose of zoning is to regulate the use of land. Dimensional regulations are of secondary importance to the use of the property and serve a lesser public purpose than use regulations. Thus, as matter of constitutional law, dimensional variances should not be

370, 379, 167 N.E.2d 406, 411 (Ill. 1960) (same); City of Atlanta v. McLennan, 237 Ga. 25, 27, 226 S.E.2d 732, 734 (1976).

subject to the same high standard as use variances. Otherwise, the denial of a dimensional variance is not rationally related to the purpose of the dimensional regulations.

1. The Standard for Dimensional Variances Should Be Different From and Lower than the Standard for Use Variances

In Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), the Pennsylvania Supreme Court stated that "when seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations." Id., 554 Pa. at 257, 721 A.2d at 47. The Court explained that "grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is outside the zoning regulation." Id. The Court then concluded that the trial court applied the proper standard when it held that the applicant for a dimensional variance need only prove that "the zoning requirements work an unreasonable hardship in the owner's pursuit of a permitted use." Id.

Courts in other jurisdictions have held that dimensional variances are subject to a lesser standard of hardship than use variances. See e.g., Wisconsin v. Outagamie County Board of Adjustment, 244 Wis. 2d 613, 630-645, 628 N.W.2d 376, 382-390 (Wis. June 29, 2001) (expressly overruling prior Supreme Court decision requiring all dimensional variance applicants to demonstrate no reasonable use of the property); Gilani v. Board of Adjustment of New Castle County, Civil Action No. 00A-07-

009-JOH, 2001 Del. Super. LEXIS 309, *9 (Del. Super. July 27, 2001) ("area [also known as dimensional] variances are subject to less stringent standards than use variance"; "an applicant must show 'exceptional practical difficulties' in order for the [Zoning] Board to grant an area variance"); Alviani v. Dixon, 365 Md. 95, 120, 775 A.2d 1234, 1248 (Md. Ct. App. July 13, 2001) ("the standards applied to [dimensional] variances are more relaxed than those applied to use variances"); Go v. Sugarcreek Township Board of Zoning, C.A. Case No. 2000 CA 66, 2001 Ohio App. LEXIS 2460, *8 (Ohio Ct. App. June 1, 2001) ("an application for [dimensional] variance must establish only practical difficulties, not unnecessary hardship"); Gormally v. Shiff, 188 Misc. 2d 873, 874, 729 N.Y.S.2d 880, 880 (N.Y.Supr.Ct., 2001) (a dimensional variance will be granted where the benefit to the applicant if the variance is granted outweighs the detriment to the health, safety and welfare of the neighborhood or community).

In Outagamie, the Wisconsin Supreme Court revisited its prior decision in Wisconsin v. Kenosha County Board of Adjustment, 218 Wis. 2d 396, 577 N.W.2d 814 (1998), in which it held that both use and dimensional variances should be held to the same "unnecessary hardship" standard: "whether a reasonable use of the property is feasible without the variance." Outagamie, 244 Wis. 2d. at 634, 638 n 12, 628 N.W.2d at 384, 386 n. 12. The Wisconsin Supreme Court overruled Kenosha County, and explicitly rejected the "no reasonable use" standard with respect to dimensional variances. Id., 244 Wis. 2d at 633-34, 628 N.W.2d at 383-84. Instead, the Court stated that the proper standard for unnecessary hardship sufficient for the issuance of a dimensional variance was "whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner

from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." Id., 244 Wis. 2d at 636-37, 628 N.W.2d at 385.

In rejecting the "no reasonable use" standard with respect to dimensional variances, the Court stated:

> The general rule throughout the United States recognized a distinction between the level of hardship required to justify area and use variance. "In most states, the courts will approve an area variance upon as lesser showing by the applicant than is requires to sustain a use variance."

Id., 244 Wis. 2d at 635-36, 628 N.W.2d at 385 (quoting 3 Kenneth H. Young, Anderson's American Law of Zoning § 20.48, at 580 (4th Ed. 1996)). The Court further held that requiring all area variance applicants to demonstrate that there is no reasonable use of the property without a variance "makes little sense," "runs a counter to the broader purposes of variance procedure," and raises constitutional concerns. Id., 244 Wis. 2d at 641, 643, 644, 628 N.W.2d at 387, 388, 389.

2. The Commonwealth Court Incorrectly Applied the Standard for Use Variances

The Commonwealth Court characterized the variance from §14-1604 as a "use" variance. (App. at 12a). This was an error for two reasons. First, in the Philadelphia Zoning Code, uses are governed by zoning classifications. Section 14-1604 is not a zoning classification. Rather, it is an overlay that imposes restrictions and conditions on the erection of

signs where signs are permitted by the applicable zoning classification. Second, the variance granted by the Zoning Board related solely to matters of measurement, such as total sign area and distance from other objects.

Even if the variance were dimensional, however, the Commonwealth Court held that a dimensional variance could not be granted unless there was unnecessary hardship arising from the unique physical circumstances of the Property. The Court found no unnecessary hardship, notwithstanding the fact that every point on the Property is within 660 feet of an ingress ramp onto I-95, and it is impossible to erect any sign on the Property without a variance from §14-1604. In addition, the Commonwealth Court found no economic hardship, because the Property was already being used profitably for the railroad business.

a. Section 14-1604 Is Not A Zoning Classification

Section 14-1604 of the Philadelphia Zoning Code does not determine the permissible uses of land. By its own terms, it "supplements" the provisions of the Zoning Code "with special restrictions regulating size, height, illumination, distances from residences, spacing, prohibition and conditions for obtaining permits." Phila. Zoning Code, §14-1604(2), App. at 112a.

Although Section 14-1604(9)(b) purports to prohibit signs within 660 feet of all ingress and/or egress ramps of the Delaware Expressway (I-95), it is a distance requirement for the erection of a sign, not a use regulation. This is because the language of Subsection 9(b) pertains to the placement or location of a sign within a certain distance from a specified structure and not to the use of a defined class of land. Thus,

if signs are a permitted use on certain land, Subsection 9(b) affects the location of the signs on that land. However, if the configuration of the property is such that compliance with the distance requirement is physically impossible, a reasonable variance should be granted.

b. The Variance from §14-1604 Granted by the Zoning Board Related Solely to Matters of Measurement

It is well settled that variances from setback, buffer area and other space and area requirements are dimensional variances rather than use variances. Pyzdrowski v. Pittsburgh Board of Adjustment, 437 Pa. 481, 489-490, 263 A.2d 426, 431 (1970); Damico v. Zoning Board of Adjustment, 164 Pa. Commw. 394, 643 A.2d 156, 162 (1994); Robert S. Ryan, *Pennsylvania Zoning Law and Practice*, §6.3.1 (1992) ("Examples of dimensional variances include set backs, lot width, building area and minimum lot areas.") Cf. Anderson, *American Law of Zoning*, 2d ed., §20.07 (dimensional variances involve matters such as setback lines, frontage requirements, height limitations, lot-size restrictions, density regulation, offstreet parking and yard requirements).

The Commonwealth Court suggested that the "take-down" requirement in §14-1604(10)(a) could not be characterized as dimensional. (App. at 12a). Nevertheless, the variance that the Zoning Board granted Conrail from this requirement was dimensional, because the variance related to sign area rather than sign removal.

Section 14-1604(10)(a) states that "For each outdoor advertising . . . erected in conformance with these provisions, an existing sign or signs encompassing an equal or greater

sign area shall be removed." Although Conrail did not propose to remove any signs in its proposal, Conrail's representative testified at trial that Conrail had removed 30 outdoor advertising signs since 1991 (when §14-1604 was enacted) for which it had not receive credit. (App. at 202a). Thus, the issue was not the removal of an existing sign, but the total sign area of the signs that Conrail had removed, which was unknown. The total sign area of the removed signs is a question of dimensions. The Zoning Board concluded that where Conrail had removed 30 outdoor advertising signs without receiving credit, it was reasonable to grant a variance from the requirement that Conrail prove that the total sign area of the removed signs was equal to or greater than the sign area of the proposed signs.

c. The Commonwealth Court Imposed a Higher Standard for a Dimensional Variance than for a Use Variance

In Hertzberg, the Pennsylvania Supreme Court indicated that an applicant for a dimensional variance need only prove that "the zoning requirements work an unreasonable hardship in the owner's pursuit of a permitted use." Hertzberg, supra, 554 Pa. at 257, 721 A.2d at 47. The court specifically held that it was not necessary to show that the property was valueless without a variance. Id., 554 Pa. at 259, 721 A.2d at 48. The court also held that it was not necessary to show that the property could not be used for any other permitted purpose. Id., 554 Pa. at 263, 721 A.2d at 50. Finally, the court held that a dimensional variance may be justified by a consideration of "multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements, and the characteristics of the surrounding

neighborhood." Id. 554 Pa. at 264, 721 A.2d at 50. Thus, the standard for dimensional variances is not limited to physical conditions alone.

The Commonwealth Court did not apply the standard for dimensional variances. On the contrary, the Commonwealth Court held that even if the variances were dimensional, Conrail was not entitled to a dimensional variance unless it could show not only an unnecessary hardship arising from unique physical circumstances of the Property but also an inability to use the property for any other purpose. One way of reading the Commonwealth Court's holding is that there is no hardship in legal contemplation, as long there is another permitted use that does not require a variance. This is the same as saying a dimensional variance may only be granted if the property cannot be used for any other permitted purpose, a standard that, according to Hertzberg, is actually stricter than the standard for a use variance. Hertzberg, 554 Pa. at 258, 721 A.2d at 47.

Alternatively, the Commonwealth Court may have meant that, where a property is being actively used, it is not a hardship to be denied an additional use, even though the additional use is a permitted use. There is nothing in Hertzberg to suggest that unreasonable hardship in the pursuit of a permitted use is lacking where the use is additional to an existing, non-exclusive use. A permitted use is a constitutionally protected property right. E.g., A.A. Profiles, Inc. v. City of Fort Lauderdale, 253 F.3d 576, 582 (11th Cir. 2001) (City's actions in refusing to allow permitted use and in later re-zoning the property constituted a taking in violation of the Fourteenth Amendment). Unless the Zoning Code reasonably provides that a particular use shall be exclusive, permissible uses may be (and frequently are) combined. Dimensional restrictions on permitted uses must be reasonable

and must not wholly eliminate a permitted use unless it is reasonably necessary to protect the public health, safety or welfare. See Colligan, supra, 401 Pa. at 123-131, 162 A.2d at 653-54. In this case, the Zoning Board concluded, and the Courts below did not disagree, that the proposed signs pose no threat to public health and safety. (App. at 43a, 63a, 82a, and 101a).

The Commonwealth Court incorrectly evaluated Conrail's dimensional variance under the standard reserved for use variances. In so doing, the Commonwealth Court arbitrarily elevated an inherently less important type of regulation to the same level as use regulation the denial of a dimensional variance. As a result, the denial of Conrail's dimensional variance was not rationally related to the purpose of the dimensional regulations and violated Conrail's rights under the due process and takings clauses of the Federal Constitution.

CONCLUSION

For all the foregoing reasons, Petitioners Conrail c/o Transportation Displays, Inc. respectfully request that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

OBERMAYER REBMANN MAXWELL
& HIPPEL LLP

THOMAS A. LEONARD
Counsel of Record
PAUL S. DIAMOND
RICHARD P. LIMBURG
STEPHEN W.W. CHING, JR.
19th Floor, One Penn Center
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103-1895
(215) 665-3000

Counsel for Petitioners
Conrail c/o Transportation Displays, Inc.